Supreme Court, U. S.
FILED
AUG 5 1977
MICHAEL RODAK, JR., CLERK

No. 76-1471

In the Supreme Court of the United States

OCTOBER TERM, 1976

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, ET AL.,

RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONER'S REPLY COMMENTS

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PETITIONER'S REPLY COMMENTS

The following reply comments are submitted by the Federal Communications Commission (Commission) in response to the Opposition to Petitions for a Writ of Certiorari (Opposition) filed in this and related cases by the National Citizens Committee for Broadcasting (NCCB). Briefly stated, NCCB's Opposition does not deal with the important issues raised by the Commission and other petitioners that warrant this Court's attention. Rather, by incorrectly stating the effect of the opinions of the court below in at least two critical respects, NCCB has obscured rather than illuminated these issues.[1]

[1] NCCB also incorrectly states that two Commissioners dissented from the Commission's refusal to order across-the-board divestiture of existing co-located newspaper-broadcast combinations (Opposition at 5-6). Commissioner Hooks would not have limited divestiture to instances of "pure

(Continued)

I

NCCB first seeks to avoid this Court's review of the important questions presented in this case by mistakenly contending that the court below did not go so far as to order that the Commission require general divestiture by existing co-located cross-owners (subject only to waiver in exceptional cases), but rather left the agency full discretion on remand to determine the nature and extent of divestiture "both generally and in each particular situation" (Opposition at 8). This interpretation of the court's mandate is simply belied by the court's own words in its opinion of March 1, 1977. There, after stating that the Commission "has sought to limit divestiture to cases where the evidence discloses that cross-ownership clearly harms the public interest," the court held that "precisely the opposite presumption is *compelled*, and that divestiture is *required* except in those cases where the evidence clearly discloses that cross-ownership is in the public interest"—and it added that such exceptions "could be accommodated through a waiver procedure" (FCC App. 60 and n.112; emphasis supplied). The court thus made it abundantly clear that, whatever the Commission's discretion might be in waiver situations, it had no choice in the context of rule making but to require across-the-board divestiture.[2]

(Continued)
monopoly," but stated that "[b]alancing inputs, I must concur with the majority's decision to the extent that it emphasizes a prospective means of attaining diversification rather than the harsh and unpredictable solution of divestments of an unprecedented scale." (FCC App. 125).

[2] The only support offered by NCCB for its contrary interpretation of the March 1 opinion is a single footnote (FCC App. 36, n.53; see Opposition at 14). But this footnote is a passing observation in connection with the court's treatment of a wholly different issue in the case—whether a divestiture order limited to the licensees whose cross interests the Commission found to be egregious could have been implemented without individualized hearings. In light of the subsequent language of the opinion at FCC App. 60, it is unreasonable to regard this footnote as in any way mitigating the effect of the court's holding.

If there could have been any doubt as to the court's intent under its original opinion, there can be none whatever after its further opinion granting the Commission's Motion for Stay of Mandate. In this unusual restatement—which was itself revised by amendment after its initial release[3]—the court sought to explain and clarify its previous holding. It characterized the above quoted language that a presumption against cross-ownership is "compelled" and divestiture "required" in all but exceptional cases as "part of the summary of our holding" (FCC App. 166). Then, after erroneously[4] declaring that "the only consistent and court approved policy" toward cross-ownership was that of "giving diversity of media ownership controlling weight", the court stated that it had

> * * * ordered the Commission * * * to ensure *that everyone* [*i.e.*, all existing cross-owners as well as all new applicants] *would be consistently treated under the standard already adopted for new license applicants* (subject of course, to an appropriate waiver procedure * * *). FCC App. 167 (emphasis added).

This careful, unequivocal language is no casual dictum; it is the court's twice reconsidered final formulation of the precise holding of the case. And it makes wholly untenable NCCB's attempt to portray the holding as a conventional remand leaving the Commission discretion to adopt a new rule providing for only limited divestiture. Accordingly, certiorari should be granted to review whether the court of appeals far exceeded its authority by dictating to the Commission the result to be reached on remand.

II

NCCB also mistakenly asserts that the decision below "establishes no new principle or policy" (Opposition at 7),

[3] The opinion in its original form is included as Attachment A to this reply.

[4] See Part II of this reply.

but merely sustains a policy which the Commission itself has promulgated and requires the agency to apply that policy uniformly. The court below, too, seeks to project this view of the case by referring to "the only consistent and court-approved policy in this field," that of "giving diversity of media ownership controlling weight" (FCC App. 167). In this case, the Commission did accord controlling weight to the need for diversity in adopting its prospective rules. But the Commission, as it demonstrated in its petition for certiorari (at 7–9), has *never* said that controlling weight must be given to diversity of ownership, or any other single component of the public interest standard, at all times and under all circumstances. To the contrary, the Commission's policy in developing cross-ownership rules over more than thirty years has been to balance several competing considerations, including not only the need to promote diversity but also the need to avoid unnecessary disruption of existing services on which the public has come to rely. In the past, this balancing approach has generally led the Commission to apply its cross-ownership rules prospectively only, and to require little or no divestiture.[5] The Commission did just that in this case. Thus, it is not the Commission, but the court below, which has elevated one component of the public interest standard into binding law by requiring that diversity be given controlling weight in *all* its rules relating to cross-ownership. Accordingly, certiorari should be granted to review (1) whether the court of appeals may substitute its judgment for that of the Commission as to the relevant weight to be accorded diversity of ownership and other policies in making rules under the public interest standard, and (2) whether the court may require that, because the Commission gave controlling weight to diversity in fashioning its

[5] NCCB's Opposition (at p. 3) singles out two instances in the period 1941–1943 when, under extreme circumstances, the Commission ordered divestiture. This is hardly a basis for implying that the agency has commonly required divestiture, either in broadcast licensing or in other matters.

prospective rules it must do so with respect to existing cross-ownerships.[6]

Respectfully submitted,
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[6] NCCB also asserts that, because existing cross-owners are treated differently from prospective cross-owners, the Commission's Order is inequitable (Opposition at 14–15). This argument may be relevant to the validity of the Order and, if so, will be addressed in our brief on the merits. It is not relevant, however, to the question of whether this case warrants certiorari. Suffice it now to point out that prospective purchasers of a commonly owned newspaper or television station, who are on notice that they cannot purchase both, are in a wholly different position from existing cross-owners who, in reliance upon the Commission's encouragement and allowance of local cross-ownerships manifested in licensing proceedings over many years, have devoted time and resources to their broadcast operations.

ATTACHMENT A

United States Court of Appeals for the
District of Columbia Circuit

No. 75–1064

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING,
PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES
OF AMERICA, RESPONDENTS
ELYRIA-LORAIN BROADCASTING CO., ET AL., INTERVENORS

No. 75–1152

OWOSSO BROADCASTING COMPANY, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES
OF AMERICA, RESPONDENTS
KSL, INC., INTERVENOR

NATIONAL ASSOCIATION OF BROADCASTERS, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES
OF AMERICA, RESPONDENTS
KSL, INC., INTERVENOR

No. 75–1379

WJAG, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES
OF AMERICA, RESPONDENTS
WHAS, INC., ET AL., INTERVENORS

No. 75–1386

THE OGDEN NEWSPAPERS, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES
OF AMERICA, RESPONDENTS
KSL, INC., INTERVENOR

No. 75–1387

DAILY TELEGRAPH PRINTING COMPANY, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES
OF AMERICA, RESPONDENTS
WHAS, INC., ET AL., INTERVENORS

No. 75–1388

THE OGDEN NEWSPAPERS, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES
OF AMERICA, RESPONDENTS
KSL, INC., INTERVENOR

No. 75-1567

AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS
KSL, INC., INTERVENOR

No. 75-1614

THE BROCKWAY COMPANY, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS
KSL, INC., INTERVENOR

No. 75-1618

GRAY COMMUNICATIONS SYSTEMS, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

KSL, INC., INTERVENOR

On Motion for Stay of Mandate

[Filed April 7, 1977]

Before BAZELON, *Chief Judge*, and WRIGHT and ROBINSON, *Circuit Judges*

PER CURIAM: Before us is a motion filed by the Federal Communications Commission to stay the mandate to be issued by this court pursuant to its opinion and order on the

merits of this case. The Commission suggests that immediate compliance with portions of our mandate would impose a "substantial burden" on its resources. Since the Commission is moving quickly to petition the Supreme Court for a writ of certiorari in this case, it asserts that such a burden ought not be required until the Supreme Court can act on its petition. The National Association of Broadcasters (NAB) supports the Commission's motion, arguing that immediate issuance of our mandate will require NAB's members to begin costly efforts leading to divestiture. The Department of Justice does not oppose the motion, but does not actively support it either. The National Citizens Committee for Broadcasting (NCCB) opposes the motion insofar as it would reinstate the requirement that petitioners to deny individual license renewal applications allege a Sherman Act section 2 violation as a precondition for a hearing on the question of undue economic concentration. NCCB would also have us stay that part of our order which vacates Commission orders requiring divestiture in 16 so-called "egregious" cases. It is not clear, however, that NCCB or anyone else will seek further review of this segment of our opinion.

Before ruling on these motions, it is important to review the salient points of our March 1 opinion. By its order in the cross-ownership case, the Commission divided its regulatory province into three parts. New broadcast licenses would not be issued to any applicant which also owned a newspaper co-located with the proposed broadcast station's area of license. Present co-located newspaper-broadcast combinations, with 16 exceptions, were grandfathered and, in addition, the Commission took the view that further challenges to the renewal of these stations' licenses would have to meet tougher threshold requirements. Divestiture was ordered only where the sole broadcast station in a locality was owned by the sole daily newspaper in the same locality.

The gist of our opinion is that the lines thus drawn between future and present co-located combinations and between the 16 egregious cases and all other present co-located

combinations were arbitrary and capricious. We first indicated that the Commission had authority to promulgate its prospective rules even though the record was inconclusive on the question whether actual "abuses" flowed from newspaper-broadcast cross-ownership. We agreed with the Commission that long-established principles indicated that it could act to increase the diversity of broadcast media voices even when there was no evidence that a lack of diversity was producing harmful side effects. We recognized that the Commission had consistently acted on this principle and had received the approval of the courts (including the Supreme Court on a number of occasions) for this policy approach. Indeed, in its instant motion, the Commission has not asked us to stay our mandate insofar as it approves the prospective cross-ownership rules. Thus now as in its defense on the merits, the Commission apparently asserts its authority and intention to act to increase diversity even though it has created no record of actual abuses stemming from cross-ownership.

Having asserted its authority and intention to act in this way with respect to applications for new licenses, however, the Commission insisted that it was required to find actual evidence of abuses before it could order divestiture of presently co-located facilities. The Commission itself recognized that such a shift of position had to be justified by reference to factors differentiating present from future licensees. One factor suggested was harm to the public interest in terms of a reduction in the quality of broadcast programming, but the Commission correctly found no record support for any such proposition. The Commission did assert policies competing with enhancement of diversity as support for its shift of emphasis, but on analysis we found that in the past these policies had consistently been given lesser weight than increased diversity and further that these policies if consistently applied in the future would require massive shifts in the practice of the Commission with respect to license transfers. We further found that the distinct treatment of

the 16 egregious cases was invalid under the Commission's announced divestiture rule since the record contained no evidence that justified their disparate treatment.

Thus, "[h]aving evaluated the policies and record presented to us, we [held] that the Commission erred in concluding that the other policies it advanced required it to find evidence of harm before ordering divestiture." Slip op. at 50. In summarizing this holding, we said, "The Commission has sought to limit divestiture to cases where the evidence clearly discloses that cross-ownership harms the public interest." *Id.* at 60. And, we continued:

> For the reasons expressed above, we believe precisely the opposite presumption is compelled, and that divestiture is required except in those cases where the evidence clearly discloses that cross-ownership is in the public interest.

This final sentence is part of the summary of our holding that the retroactive rules are invalid, and its purpose was to indicate that the presumption upon which the Commission acted rendered the divestiture rule invalid. Nothing in our opinion supports a contrary conclusion.

Thus we were faced with a situation in which the Commission had treated three indistinguishable groups very differently. Because of this, steps had to be taken to ensure equal administrative treatment. Since the only consistent and court-approved policy in this field was that which we approved in affirming the Commission's prospective rules, and because no valid reasons had been given by the Commission for departing from this policy of giving diversity of media ownership controlling weight, we ordered the Commission to reopen rulemaking proceedings so that everyone would be equally treated under the standard already adopted for new license applicants (subject, of course, to an appropriate waiver procedure, which we also ordered the Commission to adopt, but which it had already indicated would be available with respect to the egregious 16).

Against this background, it should be plain that staying our mandate in this case would, *pro tanto*, sanction unequal treatment of licensees. On the other hand, the Commission warrants that it wishes to file for review of our decision as quickly as possible, but that absent a stay it will incur substantial burdens, which could conceivably impede that effort. On consideration of these competing factors, we are persuaded to stay our mandate, only insofar as it applies to the Commission's grandfathering rules, until April 22, 1977, on the understanding that the Commission will have filed for certiorari by that date.

So ordered.

Per Curiam

George A. Fisher,

For the Court:

GEORGE A. FISHER,
Clerk.

U.S. GOVERNMENT PRINTING OFFICE: 1977